83-1237

No. _____

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

FRANCISCO SANCHEZ-MARTINEZ,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Francisco Sanchez-Martinez,
Petitioner.

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QUESTION PRESENTED FOR REVIEW

WHAT IS THE PROPER STANDARD OF APPELLATE REVIEW FROM A CIVIL ACTION TO DECIDE UNITED STATES CITIZENSHIP?

OPINION BELOW

The Ninth Circuit's opinion in *Francisco Sanchez-Martinez v. Immigration and Naturalization Service*, No. CA82-5501, dated August 22, 1983, is reproduced as Appendix I. The opinion is published at 714 F.2d 72. The order of the Ninth Circuit denying petitioner's application for rehearing is reproduced as Appendix II.

JURISDICTION

On January 27, 1982, the United States District Court, District of Arizona, entered a judgment declaring that Francisco

Sanchez-Martinez was not a citizen of the United States. A timely notice of appeal was filed, and on August 22, 1983, the Court of Appeals for the Ninth Circuit affirmed the judgment. A petition for rehearing and suggestion for rehearing en banc was filed and subsequently denied on October 26, 1983, with one judge, a member of the panel which decided the case, recommending in favor of rehearing en banc.

This Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1). Petitioner urges the Court to exercise its discretionary jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution states in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The fourteenth amendment to the United States Constitution states in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1105a(a)(5) states in pertinent part:

> Whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall . . . where a genuine issue of material fact as to petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim. . . .

STATEMENT OF THE CASE

(A) Introduction

This case presents a simple and important question: what is the standard for appellate review of a district court's declaratory

judgment on the question of citizenship. The court of appeals decided this question contrary to the principles of *Chaunt v. United States*, 364 U.S. 350 (1960); *Nowak v. United States*, 356 U.S. 660 (1958); *Baumgartner v. United States*, 322 U.S. 665 (1944); *Gonzales v. Landon*, 350 U.S. 920 (1955); *Nishikawa v. Dulles*, 356 U.S. 129 (1958); and *Woodby v. INS*, 385 U.S. 276 (1965). Rather than independently determine whether the historic facts satisfied the heavy burden of proof imposed upon the INS in citizenship cases, the court of appeals substituted a deferential "clearly erroneous" standard of appellate review. Inasmuch as this case turns upon one constitutional fact, citizenship, and the weight an appellate court should give to a district court's conclusion as to citizenship, Petitioner has set forth the history of this case in detail.

(B) Procedural History

This case began on October 24, 1974, when the Immigration and Naturalization Service ("INS") commenced deportation proceedings against Francisco Sanchez-Martinez ("Frank Sanchez"). The sole issue at the deportation hearing was Mr. Sanchez's citizenship. The INS maintained that Mr. Sanchez was a citizen of Mexico and not a citizen of the United States. It introduced evidence that Mr. Sanchez was born in Imuris, Sonora, Mexico, in 1933. Mr. Sanchez maintained that he was a citizen of the United States by birth and hence not subject to deportation. He introduced evidence that he was born in Nogales, Arizona, in 1933.

On November 6, 1974, the immigration judge held that Mr. Sanchez was not an American citizen. Mr. Sanchez appealed to the Board of Immigration Appeals, and on August 17, 1976, the Board entered its order dismissing the appeal.

Mr. Sanchez then filed a petition for review to the United States Court of Appeals for the Ninth Circuit pursuant to 8 U.S.C. § 1105a(a)(5). On November 14, 1977, a panel of the court of appeals unanimously granted the petition for review. In an unpublished memorandum decision, the court of appeals held that Mr. Sanchez had made a non-frivolous claim to American citizenship and that there was a genuine issue of material fact with respect to his place of birth. In such a case, the court of appeals held, 8 U.S.C.

§ 1105a(a)(5) required a de novo hearing on the issue of citizenship in the district court.

Pursuant to the memorandum decision, the INS commenced proceedings against Mr. Sanchez in district court on March 6, 1978. The INS took no further action in the case, it languished in the district court for over a year, and the district court entered judgment sua sponte dismissing the action for want of prosecution on December 11, 1979. CR "3."[1] The parties filed a joint motion to vacate the judgment on January 25, 1980, CR "4," and the judgment was vacated the same day, CR "5."

After mutual discovery and pretrial briefing and argument on the burden of proof, the parties proceeded to trial on October 20-23, 1981, before the Hon. Earl H. Carroll.

(C) Facts Material to the Question Presented

1. *Background Facts*

The de novo hearing on citizenship before Judge Carroll was brief. The reporter's transcript of the hearing and the deposition transcripts received in evidence total less than 500 pages. However, since all of this evidence dealt with a single very narrow factual question — where Frank Sanchez was born — the degree of factual elaboration was actually quite great. Judge Carroll complimented both counsel on the amount of evidence they were able to bring to bear on this obscure event now fifty years in the past. III RT 334-35.

Frank Sanchez's parents, Luis Tapia Sanchez and Carmen Martinez de Sanchez, both now deceased, were Mexican citizens who lived in both Mexico and Arizona in the 1920's and 1930's. In approximately 1926 they moved from Mexico to Nogales, Arizona, a town on the Arizona-Mexico border, where Luis Tapia Sanchez worked for a lumber company. I RT 19, 37. At the time

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[1] The district court clerk's record is cited as CR "___," the number in quotes indicating the docket number. The reporter's transcript is cited as ___ R.T. ___, the first number indicating the volume, and the second, the page. Ex. ___ refers to the trial exhibits. Mr. Sanchez's exhibits were denoted by numbers, the INS's, by letters.

they came to Nogales, they had two Mexican-born children, Armando and Manuel. I RT 36-37, 103, II RT 130, 146.[2] In Nogales, they had at least three more children. The eldest, Rafaela, was born in 1926. II RT 126, Ex. E. The next, Luis, was born in 1928. I RT 59-60, Ex. H. The third, Henry, was born in 1931. I RT 98, Ex. K.

Sometime between 1931 and 1936, the Sanchezes returned to Mexico, first to Bella Vista, then to La Bicoca, very small communities near Imuris, Sonora, about 35 miles south of Nogales, where they operated a restaurant. I RT 23, 27, 54, 104, II RT 143. Frank Sanchez, the last of the Sanchez children, was born on November 29, 1933, either shortly before or shortly after the family moved to the Imuris area. If his birth occurred shortly before the move, then he is an American citizen by birth like his sister Rafaela and his brothers Luis and Henry. On the other hand, if he was not born until shortly after the move, then he is an alien subject to possible deportation. Whether his birth occurred shortly before or shortly after his family's move to Mexico was the sole disputed fact in the de novo hearing before Judge Carroll.

Regardless of where Frank Sanchez was born, it is undisputed that he grew up in Mexico, went to grade school in Mexico, and aside from visits to America, lived there until 1951. II RT 140-44. In that year he came to America to register for the selective service and with a few interruptions, has lived and worked here ever since. II RT 140-41, Ex. 1. Mr. Sanchez now lives in Glendale, Arizona. II RT 139. Since 1968 he has worked as a supervisor for Production Farms, Inc. II RT 141. He is married to Maria de la Luz Paredes Sanchez, and they have four Mexican-born, and two American-born, children, ranging in age from 3 to 20. II RT 165-67. Not until the 1970's did the INS question his citizenship and seek to deport him.

2. *The Facts Bearing on Mr. Sanchez's Place of Birth*

The evidence was, of course, in conflict. Because there is no reliable, contemporaneous record of Mr. Sanchez's birth, and

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[2] Maunuel died in 1972. I RT 101. Another child, Roberto, was older than Manuel, but younger than Armando. He died long ago, but the record does not reflect exactly when. I RT 61-62.

because the one person with truly first-hand knowledge of the birth — his mother — died long before these proceedings began, II RT 144, we will never know for certain, barring the discovery of new evidence, where Frank Sanchez was born. The INS itself conceded at trial that "nobody knows for sure" where Frank Sanchez was born. III RT 318. In spite of this uncertainty, this is not a case in which the truth may be somewhere between the parties' contentions. Mr. Sanchez was either born in Arizona or Mexico; there are no other possibilities. The evidence of each, as developed at the de novo hearing, is discussed in turn below.

(a) *The Evidence of Arizona Birth*

The evidence that Mr. Sanchez was born in Arizona may be divided for convenience into five categories: direct recollection of the birth by two witnesses, family reputation evidence, testimony of neighbors about the Sanchez family after the family moved to Mexico, the evidence of Mr. Sanchez's lifelong behavior, and the evidence of his baptism.

The first category is the testimony of two people old enough to have actual recollection of the birth, Henry Bazurto and Frank Sanchez's oldest brother, Armando Sanchez. Henry Bazurto was born in February 1918 and was therefore 15 years old when Frank Sanchez was born in November 1933. I RT 9. He lived in Nogales, Arizona, until 1956, with the exception of overseas service in World War II. I RT 9, 31. He knew the Sanchez family very well until they left for Mexico in the 1930's, I RT 17-18, but by the time of the hearing he had completely lost touch with them, I RT 10-11.

Mr. Bazurto testified at length about his memories of life in Nogales in the 1920's and 1930's — his teachers, friends, church activities, the doctors in Nogales in those years, the lay of the land, and so on. I RT 12, 22, 29-33. He also testified that some time in the early 1930's the Sanchez family moved from its earlier residence on Elm Street to Bostwick Court. I RT 19-21. While the Sanchezes lived on Bostwick Court, Mrs. Sanchez had a baby named Panchito. I RT 21. The birth was attended by an Anglo physician, either Dr. Gustetter or Dr. Chenoweth. I RT 22. After Panchito was born, the family moved to Mexico, Armando and Manuel, the two eldest

children, remaining in Nogales for a time and then rejoining the family. I RT 23, 26.

The other witness old enough to have actual memory of the birth was Armando Sanchez, Frank's oldest brother. Armando was born in January 1917 and was 16 years old when Frank was born. I RT 36-37, 49. Like Mr. Bazurto he testified that his mother had a baby when the family lived on Bostwick Court and that the baby's name was Pancho. I RT 41-42. Armando had a more definite recollection of the physician attending the birth, however, since Armando himself fetched him: it was Dr. Gustetter. I RT 42. After the birth the family moved to Mexico, the father leaving ahead of the rest of the family, and Armando and Manuel leaving after the rest of the family. I RT 42, 54.

The testimonies of these two witnesses are especially significant not only because they are consistent in the crucial details — a child born on Bostwick Court, named Pancho or Panchito, whose birth was attended by an Anglo physician — but also because of the significance of these details in the light of other evidence. As Mr. Bazurto and Armando Sanchez testified, and as other evidence showed, Ex. AA, BB, the Sanchezes lived both on Elm Street and Bostwick Court in Nogales. According to their Arizona birth certificates, Ex. E, H, K, and the district court's amended findings, III RT 346, Rafaela, Luis, and Henry Sanchez were all born on Elm Street and each was attended by a midwife, not a physician. Finally, the evidence was uncontradicted that Pancho or Panchito is a nickname for Francisco, that Frank Sanchez was and is known by these nicknames, and that he is the only member of the family so known. I RT 26, 64, 172. Thus, Mr. Bazurto and Armando Sanchez could not have confused the birth of Frank with that of another Sanchez child.

The second major category of evidence of Arizona birth is family reputation evidence. Although Rafaela, Luis, Henry and, of course, Frank himself are not old enough, as Mr. Bazurto and Armando Sanchez are, to remember the birth, they all testified that their parents had told them, and that it was common knowledge within the family, that the younger children — Rafaela, Luis, Henry, and Frank — were all born in Arizona and the older children —

Armando and Manuel — were born in Mexico. I RT 62, 102-03, II RT 129-31, 144-46. The district court found as a fact that Frank Sanchez and his siblings sincerely believe that Frank was born in Arizona and that this belief is based on conversations with their parents long before this litigation began. CR "66" at ¶ 12.

The third major category of evidence of Arizona birth is the testimony of neighbors of the Sanchezes in the 1930's. Lenor Duarte de Lara and Ramon Valenzuela testified by deposition that they lived in the Imuris area in the 1930's (and still live there), that they knew the Sanchez family well, and that they remembered when the Sanchez family first arrived there. Ex. 13 at 5-7, Ex. 14 at 6-7. Mrs. De Lara was 75, and Mr. Valenzuela 71 at the time of their depositions so both were in their 20's when the Sanchez family arrived. Ex. 13 at 6, Ex. 14 at 6. Both testified that when the Sanchez family arrived Pancho was with them and Mrs. Sanchez was never pregnant when the family lived in the Imuris area. Ex. 13 at 9, Ex. 14 at 10-11.

A fourth category of evidence of Arizona birth is Mr. Sanchez's behavior during his entire life. He has always behaved as if he truly believed he was born in the United States. The district court so found. CR "66" at ¶ 12-15. He came to the United States in order to register for the selective service in 1952, soon after his eighteenth birthday, because his parents told him that he was obligated to do so. II RT 162-63. His draft card states that he was born in Nogales, Arizona. Ex. 1. Likewise, Mr. Sanchez applied for a social security card in 1955 and listed his birth place as Nogales, Arizona. Ex. 2. In 1964 and 1967 he registered the births of his Mexican children and listed his birthplace as Nogales, Arizona. Ex. 3-6. All of this occurred long before this litigation commenced.

A final category of evidence of Arizona birth is the evidence of Mr. Sanchez's baptism. He was baptised in 1936 in the Sacred Heart (Catholic) Church in Nogales, Arizona. The baptismal register does not have a column for birthplace, only for residence. Mr. Sanchez's residence is stated to be Nogales, Arizona. Ex. 11. At that time, however, according to the INS's own version of the facts, the family's residence was *not* Nogales, Arizona; the family was by then living permanently in the Imuris area. Since the residence

and birthplace of a baptized infant are nearly always the same, the most likely explanation is that the church official celebrating the baptism asked where the child was born and was told Nogales, Arizona.

This was the evidence of Arizona birth presented at the de novo hearing. The district court easily concluded that it amounted to a prima facie case of Arizona birth. II RT 187-88.

(b) *The Evidence of Mexican Birth*

At the de novo hearing, as at the original deportation hearing, the INS had only two items of evidence tending to show Mexican birth: the absence of an original Arizona birth certificate, Ex. N, and a non-contemporaneous Mexican birth record. Ex. GG-5. In its earlier opinion in this case, the court of appeals had held that this evidence, although obviously of importance, "in no way should . . . be deemed conclusive." The evidence presented at the de novo hearing, which was not presented at the deportation hearing, illustrates why this evidence is entitled to only scant weight.

The evidence at the hearing established that the absence of an Arizona birth certificate is not unusual. Alfonso Bravo, the manager of the vital records section of the Arizona Department of Health Services, testified that over 40,000 children have been born in Arizona without original Arizona birth certificates. I RT 88. This could happen, he testified, because the attending physician or midwife could have failed to execute a certificate; or because he or she could have given the original certificate to the parents, or lost it, instead of forwarding it to the local county registrar; or because the local registrar could have failed to forward it to Phoenix; or because it could have been mislaid after reaching Phoenix. I RT 86-88, III RT 282-83.

In this case it is especially understandable that Frank Sanchez does not have an original Arizona birth certificate on file in Phoenix. The evidence at the hearing established that the family lived in Nogales, Arizona, from 1926 until the 1930's; that they were poor; that the family returned to Mexico in the 1930's, expecting to stay there for good; and that the father left for Mexico in advance of the rest of the family. I RT 27, 45, 54. Two witnesses,

Armando Sanchez and Henry Bazurto, testified that an Anglo doctor, not a midwife, delivered the last Sanchez child. I RT 22, 42. In these circumstances — a poor, Mexican-heritage family, living on the border in the depth of the depression, and preparing to return at once to Mexico, the father having already left — it is hardly surprising that an Anglo physician might not have been particularly interested in executing a birth certificate, or that the family should have been relatively uninterested in obtaining one.

The INS's chief piece of evidence, however, was a Mexican birth record, Ex. GG-5, dated more than two weeks after Frank's birth and reciting that he was born in Imuris. The evidence at trial established, however, that a Mexican birth record of the 1930's is quite a different sort of document from an Arizona birth certificate. Both Mr. Barreda, the INS's own expert, and Alfonso Bravo testified that a Mexican birth record of this vintage is purely a hearsay recital. It is merely a statement by a local official of what he was told by a person who comes before him to report the birth of a child. It is not, as an Arizona birth certificate is, executed and filed by the attending physician or midwife at the birth contemporaneously with the birth. I RT 89-90, II RT 193-210, III RT 279-80. Mr. Bravo summarized the difference between the two systems by testifying that the Arizona system is a doctor-midwife generated system and the Mexican system was then a parent generated system. I RT 89.

The mere existence of a Mexican record is therefore no proof that the child was born in Mexico. Both Alfonso Bravo and Mr. Barreda testified that they had seen Mexican birth records which recited that the child was actually born in the United States. I RT 89-90, II RT 228, 232. This is impossible in an Arizona birth certificate. The mere fact that there exists an Arizona birth certificate establishes that the birth occurred in Arizona. I RT 90, III RT 279.[3]

The INS's key evidence was therefore not the Mexican record itself, nor the vast majority of its contents, but the record's recital that Frank Sanchez was born in "este pueblo" — "this town," referring to Imuris. It is these two words only that tend to

[3] Recently Arizona has modified its system so that an Arizona certificate reciting foreign birth may be issued to certain classes of foreign-born children adopted by Arizona parents. I RT 90.

show that Frank Sanchez was born in Mexico. The evidence at trial showed, however, how easily these two words could be erroneous.

Eleazar Fontes, a Mexican lawyer who devotes a considerable part of his practice to the "rectification" of Mexican birth records, testified that Mexican birth records were often prepared in a very informal fashion. This was especially so in small towns where the registrar already knew, or imagined he knew, the relevant facts:

> Q. What about in a smaller town?
>
> A. In smaller towns, the facts sometimes are known by the civil registry officer, and other times they are imagined by the civil registry officer, and thus, he establishes in the document in many occasions what he imagines the facts of the cases are.

Ex. 16 at 12. In addition, the registrar himself was often incompetent or unqualified. Mr. Fontes knew of cases in which the registrar was illiterate. Ex. 16 at 17.

Mr. Fontes testified that he had frequently had occasion to "rectify" Mexican birth records to correct errors such as the name of the city where the child was born, that the child was born at all, the name of the child, and the birth date. Ex. 16 at 19. Further, he had first-hand knowledge of four cases in which a Mexican birth record recited Mexican birth when in fact the child was born in America. Ex. 16 at 23-30. Even Mr. Barreda, the INS's own expert, testified that fully one percent of Mexican birth records from the State of Sonora were erroneous. II RT 210.

In addition to all this evidence of the unreliability of Mexican birth records generally, the birth record at issue in this case betrays on its face the haphazard manner in which it was prepared. The record purports to be only the registrar's understanding of what Frank Sanchez's father, Luis Tapia Sanchez, said to him. If such a conversation took place at all — and, before he died, Luis Tapia denied that it did, Ex. 8 — it is certain that at least one thing Luis Tapia may have said during that conversation was grossly misunderstood. The record states that Luis Tapia's mother, Escolastica de Sanchez, was "ya finad[a]" — "already dead." In fact she was not dead and did not die until 1970. I RT 43, II RT 104-05, 132.

It is difficult to believe that Luis Tapia did not know whether his own mother was living or dead. The testimony at the hearing established there was no mystery about Luis Tapia's mother and no reason to suppose that he would not have known that she was living. I RT 43, II RT 104-05, 132. It must have happened, therefore, that even if Frank Sanchez's father did meet with the registrar, the registrar simply misunderstood Frank's father's statement that his mother was "already dead." The certificate also misstates Frank's father's age — another mistake more likely to occur as a result of a misunderstanding than as a result of a mistake by Frank's father. Ex. 9.

The registrar could also have misunderstood Frank's father to say that the newly-born baby was born in that town, when in fact he may have said that the child resided in that town. Indeed, for a child so young, and with a father presenting himself to register the birth, it may never even have been discussed where the child was born, since the registrar would naturally assume that the baby was born there. And, as Mr. Fontes testified, such an assumption would have been commonplace for a rural registrar in the 1930's. Ex. 16 at 12.

On this evidence, Judge Carroll decided that the INS had carried its burden of proving alienage.[4] He issued his Findings of Fact and Conclusions of Law on January 7, 1982, CR "66", and entered judgment in favor of the INS on January 27, 1982, CR "72." Judge Carroll also entered an order staying Mr. Sanchez's deportation as long as the judgment was under review. CR "71" (later clarified, CR "85").

Mr. Sanchez timely filed a Motion for New Trial or, in the Alternative, to Amend the Findings of Fact and Conclusions of Law, on February 8, 1982. CR "78." The primary relief requested was that the court reverse itself and find that the INS had not carried its burden of proving Mexican birth. The INS responded, CR "86," Mr. Sanchez replied, CR "89," and on March 29, 1982, the district court granted some of the requested amendments, denied others, and denied Mr. Sanchez's primary request that the district court

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[4] Relying on *Lim v. Mitchell*, 431 F.2d 197 (9th Cir. 1970), Judge Carroll required the INS to prove alienage by clear, convincing, and unequivocal evidence.

reverse itself and enter judgment in his favor. CR "94." Mr. Sanchez appealed both from the judgment and the district court's denial of his Motion for New Trial. CR "90."

(D) Case History Before the Ninth Circuit

The sole issue presented for review before the court of appeals was whether the INS proved by clear, unequivocal, and convincing evidence in the de novo hearing before Judge Carroll that Frank Sanchez was born in Mexico. Relying upon the leading case in the Ninth Circuit on the standard of appellate review in citizenship cases, *Lim v. Mitchell*, 431 F.2d 197 (9th Cir. 1970), Mr. Sanchez argued that the court of appeals "must make an independent determination as to whether the evidence introduced by the INS was 'clear, unequivocal and convincing.'" 431 F.2d at 199. In other words, the court of appeals had a duty to review independently the historic facts against the burden of proof imposed upon the INS.

The INS disputed the proper scope of appellate review, arguing that the court of appeals must accept the trial court's ruling that Mr. Sanchez was Mexican-born unless the ruling was "clearly erroneous." The court of appeals agreed with the INS, stating:

> *Lim*, which involved unusual facts, does not provide the standard of review here. In *Lim* there had been a prior determination of identity and citizenship by the Service upon which both the petitioner and the government had relied for many years. Lim had claimed his citizenship derivatively from his grandfather, who was born in the United States. The government did not dispute the citizenship of the persons Lim claimed as his father and grandfather. The only issue was whether Lim was in fact the grandson of the man from whom he claimed his derivative citizenship. The district court found that Lim was not a citizen. We reversed, holding that, in light of the Service's prior determination of citizenship and Lim's reliance on it for more than thirty years, the district court had erred in concluding that the government had met its burden of proving by "clear, unequivocal, and convincing" evidence that Lim was not a United States citizen. *Lim*, 431 F.2d at 204.

> In the present case there has been no prior determination of citizenship. Sanchez-Martinez's claim to United States citizenship is based solely on his own belief and the recollections of others as to his putative birth in the United States some fifty years ago. Further, Sanchez-Martinez does not claim his citizenship derivatively from a citizen of the United States. The facts of this case are not sufficiently similar to those of *Lim* to justify a departure from our normal practice of rejecting a district court's findings of fact only if clearly erroneous. Fed. R. Civ. P. 52(a); *Yee Tung Gay v. Rusk*, 290 F.2d 630, 632 (9th Cir. 1961).

Sanchez-Martinez v. INS, 714 F.2d 72, 74 (9th Cir. 1983). After adopting the "clearly erroneous" appellate review standard, the court of appeals concluded that Judge Carroll's findings were supported by the record:

> The district court could properly have found that the following facts were "clear, unequivocal, and convincing":
>
> 1) Sanchez-Martinez does not have an American birth certificate.
>
> 2) All of his American-born siblings have American birth certificates.
>
> 3) He has a Mexican birth certificate.
>
> The district court was not clearly erroneous in concluding that these facts and other evidence, though disputed, were sufficient to support a determination that Sanchez-Martinez is not an American citizen.

Id. at 75.

The court of appeals also strongly implied, although it did not hold, that the trial judge erred in requiring the INS to rebut Mr. Sanchez's prima facie case of citizenship by "clear, convincing, and unequivocal" evidence, instead of by a preponderance of the evidence, as in a typical civil case. According to the panel, the enhanced burden of proof at trial, like the "independent determination" review on appeal, only comes into play when there has been a "prior determination of citizenship." *Id.* at 74.

The court of appeals decision therefore distinguishes two types of citizenship cases. Cases in which there has been no prior

administrative determination of citizenship are to be treated as routine civil cases. The ordinary civil preponderance-of-the-evidence burden of proof applies at trial and, on appeal, the district court's decision will be affirmed unless it is clearly erroneous. Only when there is a prior administrative determination of citizenship is the case removed from the routine category. Only then must the INS prove to the district court's satisfaction that the individual is an alien by "clear, convincing, and unequivocal evidence." And only then, according to the court of appeals, must the appellate court review the evidence itself to guarantee that this exacting standard has been met. This is not, and ought not to be, the law.

ARGUMENT

I.

THE COURT OF APPEALS ERRED BY NOT MAKING AN INDEPENDENT DETERMINATION THAT THE HISTORIC FACTS AMOUNTED TO CLEAR, UNEQUIVOCAL, AND CONVINCING PROOF THAT FRANK SANCHEZ WAS BORN IN MEXICO.

In denaturalization cases, this Court has required that the government establish its allegations by clear, unequivocal, and convincing evidence. *Chaunt v. United States*, 364 U.S. 350 (1960); *Nowak v. United States*, 356 U.S. 660 (1958); *Baumgartner v. United States*, 322 U.S. 665 (1944). The same high burden of proof was once imposed upon the government in expatriation cases. *Nishikawa v. Dulles*, 356 U.S. 129 (1958); *Gonzales v. Landon*, 350 U.S. 920 (1955) (per curiam).[5]

The principles underlying these cases are two-fold. First, this Court has recognized that in citizenship cases the Court deals with "judgments lying close to opinion regarding the whole nature

[5] The clear, convincing, and unequivocal burden of proof no longer applies in expatriation cases because the Congress amended the relevant statutes in response to *Nishikawa*. *Vance v. Terrazas*, 444 U.S. 252 (1980), held that the lower burden of proof was constitutional, especially since the government was required to prove the individual *voluntarily* repudiated his citizenship. Even *Terrazas*, however, expressed a decided preference for the clear, convincing, and unequivocal evidence standard. 444 U.S. at 266.

of our Government and the duties and immunities of citizenship." *Baumgartner v. United States*, 322 U.S. at 671. "Rights of citizenship are not to be destroyed by an ambiguity." *Nishikawa v. Dulles*, 356 U.S. at 136, *citing Perkins v. Elg*, 307 U.S. 325 (1939). Aside from the constitutional sensitivity of citizenship issues, this Court has also based its judgment upon the grave consequences to a person to be denied or stripped of citizenship. Accordingly, where Congress has not prescribed the standards of proof, this Court has "stressed the importance of citizenship and evinced a decided preference for requiring clear and convincing evidence" from the government. *Vance v. Terrazas*, 444 U.S. 252, 266 (1980).

The principles of *Chaunt*, *Nowak*, *Baumgartner*, and *Nishikawa* have not been confined to citizenship cases. In *Woodby v. INS*, 385 U.S. 276 (1966), this Court applied the "clear, unequivocal, and convincing" burden of proof in administrative deportation proceedings even though such administrative proceedings may not include a claim of citizenship. After all, the "immediate hardship of deportation is often greater than that inflicted by denaturalization," and "many resident aliens have lived in this country longer and established stronger family, social and economic ties here than some who have become naturalized citizens." *Id.* at 286.

Along with imposing a strict burden of proof upon the government in citizenship cases, this Court has also imposed a high standard of appellate review. In *Chaunt v. United States*, this Court stated:

> The issue in these cases is so important to liberty of the citizen that the weight normally given concurrent findings of two lower courts does not preclude reconsideration here . . . .

364 U.S. at 353. Moreover, in *Baumgartner v. United States*, this Court noted that the conclusion of citizenship that may be drawn from "the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court." 322 U.S. at 671. This Court has thus required the court of appeals to make an independent determination based on the historic facts as to whether or not the government has met its high burden of proof.

In *Lim v. Mitchell*, 431 F.2d 197 (9th Cir. 1970), the Court of Appeals for the Ninth Circuit held that in a case in which the sole issue is citizenship or alienage, the INS must prove alienage by clear, unequivocal, and convincing evidence once the individual establishes a prima facie case of citizenship. Moreover, the *Lim* court held that because of the grave consequences of the decision of alienage, the appellate court does not grant its usual deference to a district court's resolution of conflicting evidence. Rather, "[o]n appeal, this court must make an independent determination as to whether the evidence introduced by the Service was 'clear, unequivocal and convincing.'" 431 F.2d at 199. The *Lim* court explained that the policy behind this very heavy burden of proof was that a decision of alienage has drastic consequences for a person who has lived in America for a great many years reasonably believing that he is a citizen. A determination of alienage not only may subject the person involved to deportation, but also "may put in jeopardy the citizenship of others who have innocently claimed derivative citizenship from the same common ancestor." 431 F.2d at 200 n.4.

Lim v. Mitchell follows naturally from this Court's decisions in *Woodby, Nishikawa, Chaunt, Nowak* and *Baumgartner*. Congress has not addressed the standards of proof or standard of appellate review in de novo citizenship cases. Accordingly, it has been left to the judiciary to resolve these questions. *Woodby v. INS*, 385 U.S. at 284. This Court's cases evince a preference for imposing a high standard of proof and appellate review upon the government. This high standard of proof and scope of appellate review has been no stranger to the courts and has posed no problems in implementation. It has not occasioned a flood of litigation or thrown open the gates to the country. Rather, it accords procedural protection to a small but recurring number of cases where people claim citizenship by birth.

In this case, the Court of Appeals for the Ninth Circuit has departed from the mainstream of this Court's cases and deprived Mr. Sanchez and his Mexican-born children of United States citizenship. Henceforth, the Ninth Circuit will follow a judge-made rule that divides citizenship cases into two categories. The Ninth Circuit will impose a high standard of appellate review in citizenship

cases only if "there had been a prior determination of identity and citizenship by the Service upon which both the petitioner and the government had relied for many years." Where these facts do not exist, the Ninth Circuit will apply the deferential "clearly erroneous" standard of appellate review.

The court of appeals offers no rationale to divide citizenship cases into these two categories. None can be offered. The fourteenth amendment defines citizenship by birth or naturalization. This case involves citizenship by birth. Citizens by birth, who have believed all their lives they are U.S. citizens, and, like Mr. Sanchez, who have resided in the United States for decades, are the people least likely to seek a prior INS determination that they are citizens. Moreover, citizens by birth, like Mr. Sanchez, who were born over 50 years ago during the depression, will have the most difficult task of finding conclusive eyewitnesses to their birth. Although claims of citizenship by birth such as these should receive the highest judicial protection, the court of appeals gives them the least. Naturalized citizens, on the other hand, who necessarily will have a prior determination of citizenship, will be given the highest procedural protections by the court of appeals. There is no logic to exalting claims of citizenship by naturalization over claims of citizenship by birth.

Appellant concedes that not all citizenship cases merit the unusual procedural safeguards recognized in *Woodby* and *Chaunt*. Indeed, when the citizenship claim is first presented in a deportation proceeding, as it was here, the statutory scheme established by Congress in 8 U.S.C. § 1105a(a)(5) itself separates out cases which do not present an issue of material fact. If there is no genuine issue of material fact as to citizenship, then the INS's administrative determination of alienage must be affirmed if supported by substantial evidence. If there is a genuine issue of material fact, then the INS's determination is set aside and the case transferred to the district court for a trial de novo. *See Agosto v. INS*, 436 U.S. 748 (1978). The small number of reported cases on citizenship claims is proof that this statutory scheme is sufficient to separate the wheat from the chaff.

The Ninth Circuit has departed from this Court's teachings, however, by stating that the distinction between routine and extraordinary cases is to be found in the presence or absence of a "prior determination of citizenship by the Immigration Service." 714 F.2d at 74. Policies that warrant extraordinary procedural protections in certain types of citizenship and deportation cases cannot be reduced to such a simple, judicially-created formula. When an individual who has long reasonably believed himself to be a United States citizen suddenly finds his citizenship challenged by the government, whether in a denaturalization proceeding, a denationalization proceeding, a declaratory judgment action such as *Lim v. Mitchell*, or a section 1105a(a)(5) proceeding such as this, he is entitled to the greatest possible assurances that he will not lose his citizenship erroneously. It does not matter whether citizenship is based on a "prior determination of citizenship" by a federal agency or by the fact of birth. The unfairness and unsoundness of a test based solely on whether there has been a prior federal determination of citizenship is further illustrated by reference to the facts of this case.

II.

IF THE COURT OF APPEALS CONDUCTS AN INDEPENDENT REVIEW OF THE HISTORIC FACTS, THEN THE JUDGMENT WILL BE REVERSED.

The court of appeals decision does *not* state that the court of appeals would have reached the same decision as Judge Carroll if it had independently reviewed the historic facts. Indeed, of the three facts cited by the court of appeals to support Judge Carroll's finding, two of the facts are irrevelent, and all are subject to important countervailing evidence. The three facts are:

1. "Sanchez-Martinez does not have an American birth certificate." This is certainly true, but the evidence at trial established that there have been over 40,000 people born in Arizona who, for one reason or another, do not have original Arizona birth certificates. I RT 88. Alfonso Bravo, the manager of the vital records section of the Arizona department of Health Services explained the variety of ways in which this could happen. I RT 86-88, III RT 282-83. The absence of an Arizona birth certificate makes it all the

more understandable that Mr. Sanchez's father (or someone else) might have thought it desirable to obtain a birth record for the newly born child in their new home.

2. "All of his American-born siblings have American birth certificates." Frank's American born siblings — Rafaela, Luis, and Henry — do have Arizona birth certificates. This fact, however, does *not* tend to show that Frank was born in Mexico. The circumstances that can cause a child not to have an Arizona birth certificate are outside the control of the family; that one sibling has birth certificate has no bearing on the likelihood that another will not. Moreover, Rafaela, Luis and Henry are all older than Frank. When they were born the family was living permanently in Arizona. Frank Sanchez was born in 1933 just as the family was moving to Mexico — either shortly before, as he maintains, or shortly after, as the INS maintains. His father was already in Mexico. I RT 23, 27, 54, 104, II RT 143. These circumstances support an inference that the attending physician may not have thought it worth the trouble to prepare an Arizona birth certificate for a baby of a Mexican-heritage family in the process of moving to Mexico.

3. The court of appeals's third fact — "He has a Mexican birth certificate" — was the subject of extensive explanatory evidence. A Mexican birth certificate, unlike an Arizona birth certificate, is *not* generated by a physican or midwife. It is a narrative hearsay recital of what the registrar was told by the parent. I RT 89-90, II RT 193-210, III RT 279-80. Moreover, the Mexican certificate was not generated at the time of the birth, but two weeks later. Expert testimony established that such certificates, especially in small towns in the 1930's, were often unreliable and that their unreliability is illustrated by the existence of a relatively simple procedure for "rectifying" the information such records contain. Ex. 16.

The evidence of Mexican birth simply is not "unequivocal"; it *is* equivocal, the Mexican birth certificate above all. The affirmative evidence of Arizona birth is substantial and, on the crucial facts, self-consistent. As the government conceded at trial, "nobody knows for sure" where Frank Sanchez was born. III RT 318. There is significant doubt that he was born in Mexico. If the court of

appeals had made an "independent determination" of the evidence, it would have concluded that the INS's evidence "leaves the issue in doubt." *Lim v. Mitchell*, 431 F.2d 197, 199 (9th Cir. 1970). Accordingly, the district court judgment would be reversed.

CONCLUSION

The Court of Appeals for the Ninth Circuit has decided an important federal question in conflict with the prior decisions of this Court. This case concerns not only the citizenship of Mr. Sanchez, but the citizenship of his Mexican-born children who have lived in America their entire lives and who have claimed derivative citizenship through their father. The petition for certiorari should be granted, and this Court should clearly articulate the standard of appellate review in citizenship cases. The case should then be remanded to the Court of Appeals for the Ninth Circuit to independently determine whether the historic facts establish by clear, convincing, and unequivocal evidence that Frank Sanchez was born in Mexico, or, this Court itself may decide this issue.

Respectfully submitted this 23rd day of January, 1984.

MARTORI, MEYER, HENDRICKS & VICTOR
A Professional Association

By _____

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Ron Kilgard
Suite 4000
2700 North Third Street
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Attorneys for Petitioner

No. _____

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

FRANCISCO SANCHEZ-MARTINEZ,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

AFFIDAVIT OF SERVICE

COLIN F. CAMPBELL, being first duly sworn upon his oath, deposes and says:

That in accordance with Rule 28.2, Supreme Court Rules, he mailed the following documents for filing to the Clerk, Supreme Court of the United States, Washington, D.C. 20543 on the 23rd day of January, 1984, and to Rex Lee, Solicitor General, Department of Justice, Washington, D.C. 20530, and Elizabeth Jucius Dunn, Assistant United States Attorney, 4000 United States Courthouse, 230 North First Avenue, Phoenix, Arizona 85025:

(a) Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit;

(b) Affidavit of Service.

MARTORI, MEYER, HENDRICKS & VICTOR
A Professional Association

By _____

Colin F. Campbell
Suite 4000
2700 North Third Street
Phoenix, Arizona 85004
Attorneys for Petitioner

SUBSCRIBED AND SWORN to before me this 23rd day of January, 1984, by Colin F. Campbell.

Lola M. Sands
Notary Public

My Commission Expires:

May 5, 1987

APPENDIX I

[714 F.2d 72]

Francisco SANCHEZ-MARTINEZ,
Petitioner-Appellant,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent-Appellee.

CA No. 82-5501.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 15, 1983.
Decided June 13, 1983.

In deportation proceeding the Board of Immigration Appeals affirmed holding that petitioner was not a United States citizen. [714 F.2d 73] After de novo hearing, the United States District Court for the District of Arizona, Earl H. Carroll, J., concluded that petitioner was born in Mexico, and petitioner appealed. The Court of Appeals held that district court, which could have concluded that petitioner did not have American birth certificate, that all his American-born siblings had American birth certificates, and that he had Mexican birth certificate, did not err in determining that petitioner was not an American citizen.

Affirmed.

1. Aliens 54.3(4)

Where there had been no prior determination of citizenship, where petitioner's claim to United States citizenship was based solely on his own belief and recollections of others as to his putative birth in United States some 50 years ago, and where he did not claim his citizenship derivatively from United States citizen, no departure was justified from normal practice of rejecting district court's findings of fact only if they are clearly erroneous. Fed.Rules.Civ.Proc.Rule 52(a), 28 U.S.C.A.

2. Aliens 54.1(2)
Declaratory Judgment 342

In de novo district court hearing, citizen who is seeking a declaratory judgment on question of citizenship bears initial burden of proof while in proceedings before Immigration and Naturalization Service, citizen is in position of a defendant and thus in latter proceedings government bears initial burden of proof. Immigration and Nationality Act, § 106(a)(5), as amended, 8 U.S.C.A. § 1105a(a)(5); 28 U.S.C.A. § 2201.

3. Aliens 54.1(4)

District court, which after de novo hearing could properly have found that clear and convincing evidence established that petitioner did not have American birth certificate, that all his American-born siblings had American birth certificates and that he had Mexican birth certificate, did not clearly err in concluding that petitioner was not an American citizen. Immigration and Nationality Act, § 106(a)(5), as amended, 8 U.S.C.A. § 1005a(a)(5); 28 U.S.C.A. § 2201.

Ron Kilgard, Martori, Meyer, Hendricks & Victor, Phoenix, Ariz., for petitioner-appellant.

Elizabeth Jucius Dunn, Phoenix, Ariz., for respondent-appellee.

Appeal from the United States District Court for the District of Arizona.

Before DUNIWAY, SNEED and FARRIS, Circuit Judges.

PER CURIAM:

The Immigration and Naturalization Service initiated deportation proceedings against Francisco Sanchez-Martinez in 1974, alleging that he was not a citizen of the United States. The Service contended that he was born in Imuris, Mexico, while Sanchez-Martinez contended that he was born in Nogales, Arizona. The Immigration Judge held that he was not a United States citizen, and the Board of Immigration Appeals affirmed.

Sanchez-Martinez filed a petition for review with this court. We held that because he had made a non-frivolous claim to citizenship and had raised a genuine issue of material fact as to his place of

birth, he was entitled to a de novo hearing in the district court on the question of citizenship. 8 U.S.C. § 1105a(a)(5).

The district court ruled that the action was for a declaratory judgment pursuant to 28 U.S.C. § 2201 and 8 U.S.C. § 1105a(a)(5). Following a de novo hearing on the question of citizenship, the district court concluded that, although Sanchez-Martinez had established a prima facie case of citizenship, the Service had proved by clear, unequivocal, and convincing evidence that he was born in Mexico. We affirm.

The parties dispute the proper standard for appellate review of the district court's determination. Sanchez-Martinez argues that *Lim v. Mitchell*, 431 F.2D 197, 199 (9th Cir.1970) (quoting *Lee Hon Lung v. Dulles*, [714 F.2d 74] 261 F.2d 719, 724 (9th Cir.1958)), requires that on appeal we "make an independent determination as to whether the evidence introduced by the Service was 'clear, unequivocal, and convincing.' "

Lim, which involved unusual facts, does not provide the standard of review here. In *Lim* there had been a prior determination of identity and citizenship by the Service upon which both the petitioner and the government had relied for many years. Lim had claimed his citizenship derivatively from his grandfather, who was born in the United States. The government did not dispute the citizenship of the persons Lim claimed as his father and grandfather. The only issue was whether Lim was in fact the grandson of the man from whom he claimed his derivative citizenship. The district court found that Lim was not a citizen. We reversed, holding that, in light of the Service's prior determination of citizenship and Lim's reliance on it for more than thirty years, the district court had erred in concluding that the government had met its burden of proving by "clear, unequivocal, and convincing" evidence that Lim was not a United States citizen. *Lim*, 431 F.2d at 204.

In the present case there has been no prior determination of citizenship. Sanchez-Martinez's claim to United States citizenship is based solely on his own belief and the recollections of others as to his putative birth in the United States some fifty years ago. Further, Sanchez-Martinez does not claim his citizenship derivatively from a citizen of the United States. The facts of this case are not sufficiently similar to those of *Lim* to justify a departure from our normal practice of rejecting a district court's findings of fact only if clearly

erroneous. Fed.R.Civ.P. 52(a); *Yee Tung Gay v. Rusk*, 290 F.2d 630, 632 (9th Cir.1961).

The district court required the government to prove by "clear, unequivocal, and convincing" evidence that Sanchez-Martinez was not a citizen of the United States. In *Yee Tung Gay v. Rusk*, 290 F.2d at 631, we held that a petitioner in a declaratory judgment action in the district court to determine citizenship bore the initial burden of proving citizenship by a preponderance of the evidence. The government may then rebut this showing only by "clear, unequivocal, and convincing" evidence. *Lee Hon Lung v. Dulles*, 261 F.2d at 724. Like *Lim*, however, *Lee Hon Lung* involved a prior determination of citizenship by the Service. Whether the district court in the present case may have erred by imposing this heavy burden of rebuttal proof on the government in the absence of the special circumstances of *Lim* and *Lee Hon Lung* is not before us. Even though the proper burden may have been rebuttal by only a preponderance of the evidence, we do not decide this issue, since Sanchez-Martinez was not prejudiced if the district court held the government to a higher standard of proof than the law required.

In *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 286, 87 S.Ct. 483, 488, 17 L.Ed.2d 362 (1966), the Supreme Court held that in deportation proceedings before the Service, the government bears the initial burden of proving deportability by "clear, unequivocal, and convincing evidence." The *Woodby* standard is identical to the burden that we impose on the government in declaratory judgment actions in which there are special circumstances such as in *Lim* and *Lee Hon Lung*. We do not now decide whether such a standard is applicable in the district court to cases which do not have these special circumstances.[1] [714 F.2d 75]

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1. The allocation of the initial burden of proof flows from the nature of the proceeding. In the de novo hearing in district court, the citizen is in the position of a plaintiff seeking a declaratory judgment. 8 U.S.C. § 1105a(a)(5); 28 U.S.C. § 2201. He or she bears the initial burden of proof. In proceedings before the Service, the citizen is in the position of a defendant. It follows that in these latter proceedings the government bears the initial burden of proof. *Woodby v. INS*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362, establishes what this burden must be.We do

The district court could properly have found that the following facts were "clear, unequivocal, and convincing":

1) Sanchez-Martinez does not have an American birth certificate.
2) All of his American-born siblings have American birth certificates.
3) He has a Mexican birth certificate.

The district court was not clearly erroneous in concluding that these facts and other evidence, though disputed, were sufficient to support a determination that Sanchez-Martinez is not an American citizen.

Affirmed.

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not decide whether *Woodby* alters our rule that a citizen seeking a declaration of citizenship in the district court is required to make an initial showing of citizen-[714 F.2d 75]ship by a preponderance of the evidence. *Yee Tung Gay v. Rusk*, 290 F.2d at 631.

APPENDIX II

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCO SANCHEZ-MARTINEZ, Petitioner-Appellant,	)	CA No. 82-5501
	)	DC No. CIV 78-170
	)	ORDER
v.	)	(Arizona)
IMMIGRATION AND NATURALIZATION SERVICE, Respondent-Appellee.	)	
	)	

Before: DUNIWAY, SNEED, and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Sneed and Farris have voted to reject the suggestion for rehearing en banc and Judge Duniway would so recommend.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

[Filed October 26, 1983]